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No. 846 317

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

FRANK G. GARDNER, as Trustee in Bankruptcy of the O'Gara Coal Company, Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, as Receiver of the La Salle Street Trust and Savings Bank, Respondent.

Petition for Writ of Certiorari to Circuit Court of Appeals, Seventh Circuit.

BRIEF FOR RESPONDENT.

HIRAM T. GILBERT,
Attorney for Respondent.

BARNARD & MILLER PRINT, CHICAGO.

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Brief for Respondent.

In answer to the points discussed by petitioner the respondent presents the following:

I.

A DEPOSIT MADE BY A TRUSTEE IN BANKRUPTCY OF HIS TRUST FUNDS IS NO MORE SACRED, IN THE EYE OF THE LAW, THAN A DEPOSIT MADE BY A WASHERWOMAN OF HER SAVINGS.

The claim is made by petitioner that because petitioner is a trustee in bankruptcy and the La Salle Street Trust & Savings Bank was duly appointed by the District Court as a depositary of the funds of estates of bankrupts, petitioner's position as a depositor of the bank entitles him to some rights which are not accorded to other depositors. No authority is cited which supports any such proposition.

The La Salle Street Trust & Savings Bank, by receiving the deposit of the trustee in bankruptcy, did not make itself a trustee nor did it make the funds deposited trust funds. No other relation was created between the trustee in bankruptcy and the bank than that existing between an ordinary depositor and the bank which receives his deposit. When deposits are made in a bank the money deposited becomes the money of the bank and the bank becomes a debtor and the depositor a creditor to the amount of the deposit.

No reason can be alleged why a trustee in bankruptcy should have greater rights as against a bank than a washerwoman who deposits her savings in the bank. Both are unfortunate and neither one should be permitted to claim an advantage over the other.

II.

THERE IS NOTHING IN THE CIRCUMSTANCES OF THIS CASE TO JUSTIFY TREATING IT AS AN EXCEPTION TO THE RULE THAT THE RIGHT OF SET OFF MUST BE MUTUAL.

It cannot be contended that at the time the La Salle Street Trust & Savings Bank suspended its receiver could have applied the deposit of the trustee in bankruptcy in payment of the bankrupt's note, leaving the trustee in bankruptcy a claim for the difference between the amount of the note and the amount of the deposit. No court would have permitted him to do this. On the other hand it cannot be successfully contended that the trustee in bankruptcy might have applied the deposit so far as necessary to the extinguishment of the note of the bankrupt and prosecuted his claim against the insolvent bank for the balance. The amount deposited in the bank might have been the only asset possessed by the bankrupt

for the payment of its debts and the result of the application of this deposit to the payment of the debt due the bank from the bankrupt would have been to give the bank a preference over other creditors.

The circumstance that the trustee in bankruptcy deposited the funds of the bankrupt estate in the La Salle Street Trust & Savings Bank instead of in some other bank is not important. Another bank in which the deposit might have been made might also have become insolvent, in which case the trustee in bankruptcy would have been compelled to content himself with such dividends as might be declared by the insolvent bank.

III.

THE DEPOSITORS OF THE TRUST AND SAVINGS BANK SHOULD NOT BE PUNISHED FOR ITS SINS.

It is suggested that the La Salle Street Trust & Savings Bank embezzled the funds deposited by the trustee in bankruptcy and thereby betrayed the trust reposed in it by law and by the court.

A poor washerwoman who deposited her savings in the La Salle Street Trust & Savings Bank would have just as good ground as the trustee in bankruptcy for asserting that the bank had embezzled her money and had betrayed the trust reposed in it by her. Indeed, she might have a better cause of complaint than the trustee in bankruptcy, for she might allege that the loan made by the bank to the bankrupt only a few days prior to its going into bankruptcy was one of the causes of the insolvency of the bank and of the loss by her of her savings.

It must not be overlooked that the court in this case is not dealing with a controversy between the bankrupt on one side and the bank on the other. The bankrupt

and the bank are both, as a matter of law, dead. The real parties in interest are the creditors of the bankrupt on the one side and the creditors of the bank on the other and neither set of creditors can be justly charged with the sins of their respective debtors. They have not sinned, but have been sinned against. There would be just as much propriety in punishing the creditors of the bankrupt for its sins as there would be in punishing the creditors of the bank for its sins.

IV.

THE TRUSTEE IN BANKRUPTCY IS ESTOPPED FROM CLAIMING ANY RIGHT OF SET OFF.

Even if the trustee in bankruptcy subsequent to the insolvency of the bank was in a position to assert a right of set-off he lost that right through his subsequent conduct.

In June, 1916, nearly two years after the Trust & Savings Bank suspended, when, according to the present contention of petitioner, he might have presented his petition in the bankruptcy proceeding and secured an order setting off so much of the deposit account of $19,843.62 against the $15,000 note of the O'Gara Coal Company as was necessary to satisfy it, he voluntarily entered his appearance in the State court and sought and obtained an order of that court for the payment in full of the $19,843.62 out of the assets of the Trust & Savings Bank in due course of administration pro rata with the Trust & Savings Bank's other creditors. He expressed no willingness to have the amount of the O'Gara Coal Company note set off against his claim. He was quite willing to have the receiver of the Trust & Savings Bank pay his claim in full, if the assets of the Trust & Savings Bank were sufficient for that purpose, and leave the receiver of the Trust & Savings Bank to take his chances of collecting the

$15,000 note out of the O'Gara Coal Company's assets or out of the collateral, with the possible result that the trustee in bankruptcy might obtain full payment or nearly full payment of his claim and the receiver of the Trust & Savings Bank might not be able to obtain anything upon his claim.

Of course, when the O'Gara Coal Company went into bankruptcy the coal business was not very prosperous and very likely it did not appear to be very prosperous when the trustee in bankruptcy concluded to take his chance of getting payment of the $19,843.62 out of the assets of the Trust & Savings Bank and leave the receiver of the Trust & Savings Bank to get what he could out of the assets of the O'Gara Coal Company or out of the collateral.

Since, however, the coal business has picked up and the O'Gara Coal Company's financial affairs have greatly improved and it is to the best interests of the trustees in bankruptcy to now claim the right of set-off, he wishes to retrace his steps and do what he now claims he might have done at any time.

A peculiar feature of this situation must not be overlooked and that is that the trustee in bankruptcy, by accepting the dividends from the estate of the insolvent Trust & Savings Bank received several thousand dollars more than, according to his present contention, he was entitled to. This money he has wrongfully retained more than four years and now finds it necessary to pay it back in order to obtain the relief to which he claims to be entitled. That he did not get still more he now claims to be entitled to is not his fault, but has resulted from the fact that no further dividends have been paid thus far by the receiver of the Trust & Savings Bank.

If there ever was a case where the doctrine of estoppel was applicable it is submitted that this is one. It would

seem to be a clear case of election of remedies which is binding upon the parties making the election.

In re Berry, 174 Fed. 409; 99 C. C. A. 360.

Standard Varnish Works v. *Haydock*, 143 Fed. 318; 14 C. C. A. 456.

20 Corpus Juris 32.

V.

THIS MATTER HAS BECOME RES ADJUDICATA.

Apart from the objection of estoppel it is submitted that this matter has become *res adjudicata* by the decree of the Circuit Court of Cook County. The jurisdiction of that court over the controversy was as complete as would have been the jurisdiction of the United States District Court had the jurisdiction of the latter been invoked by the trustee in bankruptcy instead of his proceeding in the State court. The relief granted by the State court was entirely inconsistent with the relief now claimed by the trustee in bankruptcy, and hence to gain the relief the trustee now claims would operate as a review of the decree of the State court by the United States District Court and that, too, after the decree of the State court has been partly carried into execution. This, it is respectfully submitted, cannot be allowed.

We, therefore, insist that the order of the Circuit Court of Appeals was right and that the petition for a writ of certiorari should be denied.

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Attorney for Respondent.